IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. WRIGHT, SR.	:	CIVIL ACTION
	:	
v.	:	
	:	
MONTGOMERY COUNTY, et al.	:	NO. 96-4597

MEMORANDUM AND ORDER

HUTTON, J. February 25, 2002

Presently before this Court is Defendants Montgomery County and Montgomery County Commissioners Mario Mele, Richard S. Buckman and Joseph M. Hoeffel, III's Motion for Summary Judgment (Docket No. 197), Plaintiff Robert E. Wright, Sr.'s Response thereto (Docket No. 199), and Defendants' Reply (Docket No. 200). For the foregoing reasons, Defendants' Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

This is an employment discrimination case based on race. In his sole remaining count, Robert E. Wright, Sr. ("Wright" or "Plaintiff") claims that Defendants retaliated against him, in violation of 42 U.S.C. § 1981, by terminating his employment as Director at the Montgomery County Department of Housing Services ("MDHS") for protesting against his own mistreatment for being a

member of a racial minority. In the instant Motion, Defendants move this Court for summary judgement as to Plaintiff's claims for damages for reinstatement, front pay and back pay. Defendants filed their Motion on July 3, 2001. On July 18, 2001, the Plaintiff filed his Response in opposition to the Defendants' Motion. Defendants filed a Reply to the Plaintiff's Response on August 6, 2001. The Court now considers these filings.

II. LEGAL STANDARD

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. When the moving party

does not bear the burden of persuasion at trial, as is the case here, its burden "may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the [nonmoving] party's pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. See Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990).

To determine whether summary judgment is appropriate, the Court must determine whether any genuine issue of material fact exists. An issue is "material" only if the dispute "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. If the evidence favoring the nonmoving party is "merely colorable," "not significantly probative," or amounts to only a "scintilla," summary judgment may be granted. See id. at 249-50,

252; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348 (1986) ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." (footnote omitted)). Of course, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson, 477 U.S. at 255; see also Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255; see also Big Apple BMW, 974 F.2d at 1363. Thus, the Court's inquiry at the summary judgment stage is only the "threshold inquiry of determining whether there is the need for a trial," that is, "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250-52.

III. DISCUSSION

A. Section 1981 Claim

To sustain a section 1981 discrimination claim, Plaintiff

must show that Defendants intentionally discriminated against him "because of race in the making, performance, enforcement or termination of a contract or for such reason denied [him] the enjoyment of the benefits, terms or conditions of the contractual relationship." McBride v. Hosp. of the Univ. of Pa., Civ. A. No. 99-6501, 2001 WL 1132404, at *3 (E.D. Pa. Sept. 21, 2001); see also Brown v. Philip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001). Race discrimination claims brought under section 1981 are analyzed under the familiar framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999). Under the traditional McDonnell Douglas framework, the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination by showing that he (1) was a member of a protected group, (2) was qualified for his position, (3) suffered an adverse employment action, and (4) that similarly situated employees, who are not members of the protected group, were treated more favorably. See Ezold v. Wolf, Block, Schorr and Solis Cohen, 983 F.2d 509, 522 (3d Cir. 1993).

Once a plaintiff satisfies the now familiar four-part test, thereby establishing a prima facie case, there arises a presumption of discriminatory intent by the defendant-employer. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993).

Although the ultimate burden of persuasion remains with the plaintiff, the burden of production shifts to the defendant-employer who must explicate a nondiscriminatory, legitimate justification for its treatment of the plaintiff. Id. at 507. To satisfy its burden, the defendant-employer must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's allegedly unlawful treatment. Burdine, 450 U.S. at 255. The defendant-employer must only explain the nondiscriminatory reasons for its actions. Id. at 260. If the defendant-employer satisfied its burden, the presumption is rebutted and thereafter drops from the case. Id. at 255 & n.10.

The plaintiff, to prevail on his discrimination claim, must prove by a preponderance of the evidence that the legitimate reasons proffered by the employer "were not its true reasons, but were a pretext for discrimination." McDonnell Douglas, 411 U.S. at 802. Therefore, to survive summary judgment where an employer-defendant articulated a legitimate nondiscriminatory reason for its actions,

> the plaintiff must point to evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action.

Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994).

To discredit the employer's articulated reason, the plaintiff need not produce evidence that necessarily leads to the conclusion that the employer acted for discriminatory reasons, Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir. 1995), nor produce additional evidence beyond his prima facie case, Fuentes, 32 F.3d at 764. The plaintiff must, however, point to "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons [such] that a reasonable fact finder could rationally find them 'unworthy of credence'" and hence infer that the proffered nondiscriminatory reason "did not actually motivate" the employer's action. Simpson v. Kay Jewelers, 142 F.3d 639, 644 (3d Cir. 1998) (citing Fuentes, 32 F.3d at 764-65).

As was mentioned above, the Plaintiff's sole remaining count alleges that Defendants retaliated against him, in violation of 42 U.S.C. § 1981, by terminating his employment as Director at the Montgomery County Department of Housing Services ("MDHS") for protesting against his own mistreatment for being a member of a racial minority. The Defendants' Motion for Summary Judgment is based on this section 1981 claim.

B. Analysis of Defendant's Motion

In the instant Motion, Defendants move this Court for

summary judgement as to Plaintiff's claims for damages for reinstatement, front pay and back pay. The Defendants base their Motion on the Supreme Court's decision in McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 361-62 (1995). In McKennon, the Supreme Court held that "after-acquired evidence" of wrongdoing (evidence acquired after an employee is terminated) is not relevant to the liability determination in a Title VII case. Id. at 359-60. The employer's motive in ordering the actual discharge is the paramount concern. Id.

The Court did find that after-acquired evidence may be relevant to the remedy stage. Id. at 361-63. However, the employer must meet a certain test before the evidence can be offered. Id. at 362-63. "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." Id. If the employer satisfies this burden, the Court stated that "neither reinstatement nor front pay is an appropriate remedy." Id. at 362. Instead, the remedy, absent extraordinary circumstances, should be the "backpay [calculated] from the date of the unlawful discharge to the date the new information was discovered." Id. at 362.

Based on the rule set forth in McKennon, the Defendant has moved for summary judgment, essentially arguing that, even if Plaintiff had been terminated for racial reasons, the HUD Report, the record from Plaintiff's Grievance Hearing and additional evidence of misconduct preclude reinstatement, front pay and back pay. See Def.'s Mot. Summ. J. at 23-24. Specifically the Defendant argues that, because the evidence that allegedly demonstrates that Plaintiff's termination was lawful was acquired before the date of his termination, then under the reasoning of McKennon, no relief is warranted in this case.

The Defendant's argument is unique but is not legally justified. First, the McKennon decision dealt with after-acquired evidence, that is, evidence that was acquired after the decision to terminate employment was made. See McKennon, 513 U.S. at 354. In the instant Motion, the Defendant admits that "[i]n this case, it is undisputed that the alleged misconduct was discovered prior to suspension and termination." See Def.'s Mot. Summ. J. at 23.

The Defendants do allege in their Motion that the present Montgomery County Commissioners have recently learned of other serious misconduct by the Plaintiff, including that the Plaintiff allegedly received "kickbacks" from contractors. Id. The Defendants, however, do not offer any evidentiary support for

this allegation in the instant Motion. The only new evidence offered by the Defendants is an affidavit from Michael D. Marino, Montgomery County's newly-elected county commissioner, which is speculative and not probative.

However, even though the Defendant's Motion is based on evidence that was not "after-acquired," this is not a per se ban on the application of McKennon. McKennon's broader holding was that an employer's liability for damages arising from discriminatory conduct ends when the employer has a valid reason for an employment decision. See Lapham v. Vanguard Cellular Systems, Inc., 102 F.Supp.2d 266, 270 (M.D.Pa 2000). Technically, therefore, this valid reason could arise either before or after the decision to terminate employment is made.

However, if evidence of a legitimate non-discriminatory reason to terminate employment is known to an employer prior to the adverse employment action, this evidence is more appropriately placed within the traditional McDonnell Douglas framework as the Defendant's rebuttal of the Plaintiff's prima facie case of discrimination, rather than be considered as after-acquired evidence under McKennon. Moreover, the McKennon case does not advance the Defendants' argument that summary judgment be entered in this case.

The facts in McKennon are distinguishable from the instant case. The decision in McKennon was based on the fact that the Plaintiff admitted that she had copied confidential company documents and disclosed them to her husband, which was in violation of her job responsibilities. See McKennon, 513 U.S. at 355. In the instant case, however, the Defendant has not pointed to any such admission of wrongdoing by the Plaintiff.

Moreover, essential to the McKennon decision was that the district court found that the Plaintiff's misconduct was so grave that Plaintiff's immediate discharge would have followed its disclosure. Id. at 356. Contrary to the Defendants' assertion, this Court has made no such legal conclusion. The Defendants cite to this Court's Order dated May 5, 1999, which made several statements to the effect that the Defendants possessed "sufficient evidence of the Plaintiff's misconduct." See Wright v. Montgomery County, et. al, 1999 WL 286442, at *3 (E.D.Pa May 5, 1999), attached to Def.'s Mot. Summ. J. at Exh. D, pp. 5-7. The Defendants have taken the Court's statements out of context.

The Order that Defendants refer to was a motion for sanctions relating to a discovery dispute. The Court made these statements in the context of showing that the Defendants did not suffer any prejudice from the Plaintiff's alleged lack of

cooperation during discovery. See id. at *3. Moreover, the Court expressly clarified these statements as follows:

> The Court notes that although the Defendants produced sufficient evidence of the Plaintiff's misconduct with their motion for summary judgment, the Court found that a genuine issue of material fact existed as to whether the Plaintiff's termination was racially motivated. The Court found that Wright had produced sufficient evidence for a reasonable jury to infer that race was a determinative factor in Plaintiff's termination. The disputed causal connection and the credibility of the proffered explanation are, of course, issues that a jury must resolve.

See id. at *2, n. 4.

Therefore, contrary to the Defendants' assertion, this Court has not made any conclusion that the Defendants were legally justified in their decision to terminate the Plaintiff. Moreover, the Defendants have not demonstrated as a matter of law that they had a legally justifiable reason for terminating the Plaintiff. The McKennon Court stated that "[w]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." See McKennon, 513 U.S. at 362-63. The wrongdoing that the Defendants allege is precisely what led to the Defendants' termination decision, which is what is in dispute in this case. Therefore, the reasoning in McKennon is not

applicable to the instant case. Accordingly, this Motion must be analyzed under the McDonnell Douglas framework.

Applying the traditional McDonnell Douglas framework, this Court has previously held that the Plaintiff has made out a primae facie case of retaliation under section 1981. See Wright v. Montgomery County, et. al, 1999 WL 145205, at *6 (E.D.Pa Mar. 15, 1999). First, the Plaintiff was engaged in an activity protected by Title VII when he complained of the bias of his treatment. Id. Second, the Defendants took adverse action against Wright by subsequently terminating his employment. Id. Third, Wright alleged that Mele, Buckman, and Hoeffel were aware that he had expressed a concern about his mistreatment. Id.

Defendants dispute, however, that Wright's termination was racially motivated. In putting forth its non-discriminatory explanation, Defendants have previously contended that Montgomery County terminated Wright because an audit by the United States Department of Housing and Urban Development, Office of Inspector General ("HUD Audit") revealed that Plaintiff Wright, and two other Caucasian employees, Thomas Raimondi and Philip Montefiore, all engaged in conflicts of interest by using these same HUD contractors to perform work on their own private properties.

In this instant Motion, the Defendants essentially offer the same non-discriminatory explanations for their treatment of the

Plaintiff. The Defendants state that evidence of conflicts of interest, the HUD Report, mismanagement, misconduct, and material non-disclosures formed the basis for their decision to terminate the Plaintiff's employment. See Def.'s Mot. Summ. J. at 23. Each of these items were included in the findings of the HUD audit report, which the Defendants have previously stated formed the basis for their decision to terminate the Plaintiff. See Def.'s Mot. Summ. J. at 2-5, 20-21. The Defendants' argue that their reliance on the findings of the HUD report was the legitimate non-discriminatory reason for their employment decision.

In its response to the Defendants' Motion, the Plaintiff offers evidence that the purported non-discriminatory reasons offered by the Defendants are pretextual. Specifically, the Plaintiff claims that three other Montgomery County employees, former commissioner Mario Mele, Denise Neuschwander, and an unnamed county assessor, engaged in similar conflict of interest situations yet were not terminated from their employment. See Pl.'s Resp. at Exh. A, B, C, and D. Accordingly, factual disputes exist regarding Montgomery County's decision to terminate Plaintiff's employment which preclude the granting of summary judgment.

As this Court previously held in its Order dated March 15, 1999, the disputed causal connection and the credibility of the

proffered explanation in this case are issues that a jury must resolve. See Wright, 1999 WL 145205, at *6. A plaintiff "need not prove at the [summary judgment] stage that the employer's purported reason for its actions was false, but the plaintiff must criticize it effectively enough so as to raise a doubt as to whether it was the true reason for the action." Solt v. Alpo Pet Foods, Inc., 837 F.Supp. 681, 684 (E.D.Pa. 1993).

Moreover, this Court is mindful that summary judgment is "ordinarily inappropriate" in the context of a workplace discrimination case because the allegations usually require an exploration into an employer's true motivation and intent for making a particular employment decision. See Patrick v. LeFevre, 745 F.2d 153, 159 (2d Cir. 1984). Therefore, because the Plaintiff has demonstrated that a genuine issue of material fact exists regarding the termination of his employment, summary judgment is not warranted in the instant case. Accordingly, the Defendant’s Motion is denied.

An appropriate Order follows.

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	:	
v.	:	
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MONTGOMERY COUNTY, et al.	:	NO. 96-4597

O R D E R

AND NOW, this 25th day of February, 2002, upon consideration of Defendants Montgomery County and Montgomery County Commissioners Mario Mele, Richard S. Buckman and Joseph M. Hoeffel, III's Motion for Summary Judgment (Docket No. 197), Plaintiff Robert E. Wright, Sr.'s Response thereto (Docket No. 199), and Defendants' Reply (Docket No. 200), IT IS HEREBY ORDERED that Defendants' Motion is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.